SUPREME COURT, U.S.
FILED
05-497 OCT 14 2005
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No. _____

In the Supreme Court of the United States

JAMES R. LUKOWSKI AND
LESTER J. BLAUVELT,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether the Sixth Circuit Court of Appeals misinterpreted *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and § 51 of the Federal Employers' Liability Act, by ruling that a railroad employee – who (1) sustained physical impact in a train/pickup-truck collision, and (2) was in the zone-of-danger – "must demonstrate that his or her emotional injury results from a fear for his or her own physical safety," while in the zone of danger, *Lukowski v. CSX Transportation*, 416 F.3d 478, 483-84 (6th Cir.) (July 19, 2005), thereby insulating Railroads from liability for Post-Traumatic Stress Disorder.

Parties to the Proceedings

Petitioners James R. Lukowski ("Lukowski") and Lester J. Blauvelt ("Blauvelt") were employees of Respondent CSX Transportation, Inc. ("CSX" or "the Railroad").

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Lukowski and Blauvelt respectfully petition for a Writ of Certiorari to review the July 19, 2005, opinion of the Sixth Circuit Court of Appeals.

Opinions Below

The Sixth Circuit opinion in *Lukowski v. CSX Transportation* (App. A at 1a-14a) is reported at 416 F.3d 478 (6th Cir.) (July 19, 2005). And the District Court opinion in *Lukowski v. CSX Transportation* (App. B at 15a-21a) is reported at 332 F.Supp.2d 1065 (N.D. Ohio) (2004).

Jurisdiction

The opinion of the United States Court of Appeals was decided on July 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 51 of the Federal Employers' Liability Act ("F.E.L.A.") provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such

> employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

45 U.S.C. § 51.

Statement of the Case

Lukowski and Blauvelt were operating a locomotive for their employer, CSX Transportation, Inc., when their train collided with a motorist in a pickup truck who ran through an unguarded crossing. *Lukowski*, 416 F.3d at 479. The motorist was killed when the locomotive slammed into his vehicle. *Lukowski*, 416 F.3d at 479.

As a result of the collision and emergency braking, Lukowski and Blauvelt were jostled around and sustained bruises. *Lukowski*, 416 F.3d at 479; and 332 F.Supp.2d at 1067 ("On impact, both plaintiffs were bounced around. Neither was physically injured, aside from some minor bruises that did not require medical attention."). *See also R. 81; Ex. 16 [Blauvelt Deposition] at 47-48; Apx. at 410-411* (App. C at 23a-24a) ("my knee and my leg was slightly bruised"); *R. 81; Ex. 16 [Blauvelt Deposition] at 48; Apx. at 411* (App. C at 24a) (the following day, "I woke up and there was a visual bruise on the side of my knee and on the side of my leg from where it had hit the wall in the cab"); *R. 81; Ex. 16 [Blauvelt Deposition] at 47-48; Apx. at 410-411* (App. C at 23a-24a) (as a result of the impact from the collision, he

was also [illegible]led around); *R. 81; Ex. 17 [Lukowski Deposition] at 19-20, [illegible]x. at 432-433* (App. D at 26a-27a) (as a result of the collision, he was "jostled around back and forth from the impact, and then from throwing the train into emergency")). Lukowski also suffered a sore back from the impact. *R. 47; Ex. 17 [Lukowski Deposition], p. 48, App. at 102* (App. D at 27a-28a) ("I woke up the next morning, my back was a little stiff").

Blauvelt further testified about the fear of derailment that was felt on impact and during the emergency braking. *R. 81; Ex. 16 [Blauvelt Deposition] at 47; Apx. at 410* (App. C at 23a) (on impact there was "a lot of noise," and "a lot of fear").

The complaint that Lukowski and Blauvelt filed against CSX alleged that, as a result of negligence by CSX in failing to control vegetation at the crossing, they were unable to see the pickup truck, and stop their train, before the collision. *Lukowski*, 416 F.3d at 481. And Lukowski and Blauvelt testified they suffered from severe Post-Traumatic Stress Disorder as a result of this collision. *Lukowski*, 416 F.3d at 480.

On CSX's motion for summary judgment, the District Court concluded that there was sufficient evidence that *a* cause of the accident was negligence by the Railroad, and that Lukowski and Blauvelt were in the zone-of-danger. *Lukowski*, 332 F.Supp.2d at 1068. However, the District Court concluded that Petitioners were not entitled to recover under the F.E.L.A., because the Court deemed their emotional distress as having been caused by (1) what they witnessed in the aftermath of the accident (the corpse of the motorist), and (2) by feelings of guilt for not having been able to stop the train before the collision. *Lukowski*, 332 F.Supp.2d at 1068

("for purposes of this decision, I deem their claim to come within the *Gottshall* rule. Recovery on such claim depends, however, on a showing that the emotional injuries resulted from a fear for one's own safety, rather than for the safety of others.").

According to the District Court, the Supreme Court's opinion in *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) ("*Gottshall*"), meant that Lukowski and Blauvelt could only recover for fear for their own safety while they were in the zone of danger. *Lukowski*, 332 F.Supp.2d at 1068. Since the District Court allocated Lukowski and Blauvelt's emotional-distress to what they saw and felt *after* the accident, the Court ruled that they could not recover under the F.E.L.A. for Post-Traumatic Stress Disorder. *Lukowski*, 332 F.Supp.2d at 1068 ("Though the plaintiffs sustained a minor physical impact, and may have been within the zone of danger created by that collision, their resulting emotional injuries did not arise as a result of a fear of harm to themselves.").

Affirming, the Sixth Circuit Court of Appeals concluded that a railroad employee who was in the zone-of-danger of a collision, and who was jostled around and sustained bruises in the accident, can only recover for fear for his or her own safety while in the zone-of-danger. According to the Sixth Circuit:

> "Given *Gottshall*'s explicit reference to 'emotional injury caused by fear of physical injury to himself,' we hold that in order to recover damages for emotional distress under FELA, **the plaintiff must**

> **demonstrate that his or her emotional injury results from a fear for his or her own physical safety."**

Lukowski, 416 F.3d at 483-84 (emphasis added).

Reasons for Granting the Petition

The Sixth Circuit's opinion is inconsistent with and contrary to the Supreme Court's opinions in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997).

Because of lingering ambiguity in *Gottshall*, only the Supreme Court can resolve the issue presented by this case. Having created the controversy because of an ambiguous passage in *Gottshall*, the Supreme Court should resolve this dispute about whether "the plaintiff must demonstrate that his or her emotional injury results from a fear for his or her own physical safety," while in the zone of danger. *Lukowski*, 416 F.3d at 483-84.

Noting the ambiguity in *Gottshall*, the Third Circuit observed, in *Bloom v. Consol. Rail Corp.*, 41 F.3d 911, 915 n. 4 (3d Cir.1994), that *Gottshall* is "unclear" as to "whether the Court would require the plaintiff to actually fear physical injury (to himself) as a prima facie element (absent physical impact) or would just consider fear in determining damages." *Bloom*, 41 F.3d at 915 n. 4.

The Court in *Bloom* decided that the Supreme Court in *Gottshall* "appears to have adopted the damages approach (by stating that 'a worker in the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself[.]'" *Bloom*, 41 F.3d at 915 n. 4.

Yet, in *Lukowski*, the Sixth Circuit Court of Appeals concluded that Lukowski and Blauvelt had no claim for Post Traumatic Stress Disorder under the F.E.L.A., because *Gottshall* supposedly limited them to recovering for fear for their own safety while they were in the zone-of-danger. *Lukowski*, 416 F.3d at 483.

The Sixth Circuit's ruling – which is based on a recognized ambiguity in the Supreme Court's 1994 opinion – represents the product of a profound misunderstanding of *Gottshall*. Under the two-prong test of independent alternatives adopted by the Supreme Court in *Gottshall*, recovery for emotional injury in F.E.L.A. cases is limited "to those plaintiffs who sustain a **physical impact** as a result of a defendant's negligent conduct, **or** who are **placed in immediate risk of physical harm** by that conduct." *Gottshall*, 512 U.S. at 547-48 (emphasis added).

Consequently, railroad employees can sue their employers for negligent infliction of emotional distress under the F.E.L.A. when they (1) "sustain a **physical impact** as a result of a defendant's negligent conduct," **or** alternatively (2) "are placed in immediate risk of physical harm by that conduct." *Gottshall*, 512 U.S. at 547-48 (emphasis added).

Significantly, for part-one of the *Gottshall* test, this can be "physical impact (**no matter how slight**)." *Gottshall*, 512 U.S. at 547 (emphasis added). Accordingly, in deciding that a railroad employee can recover under the F.E.L.A. for negligent infliction of emotional distress, the first alternative test adopted by the Supreme Court was the traditional, majority "physical impact" standard. See *Gottshall*, 512 U.S. at 547-48.

Then, to further the F.E.L.A.'s "broad remedial goals," the Supreme Court decided to also permit recovery under the "progressive rule of liability" provided by the zone-of-danger test, for situations where the defendant's negligent conduct has not caused "physical impact" to the plaintiff. When there has been no physical impact, recovery for negligently inflicted emotional distress is permitted for plaintiffs "who are placed in immediate risk of physical harm by that conduct." *Gottshall*, 512 U.S. at 548.

So, the first rule of law which should have been applied, in determining whether Lukowski and Blauvelt presented sufficient evidence to recover under *Gottshall*, is whether, as a result of CSX's negligence, they "sustained a physical impact (**no matter how slight**)." *Gottshall*, 512 U.S. at 547. As the Third Circuit explained in *Bloom v. Consolidated Rail Corporation*, 41 F.3d 911, 916 (3d Cir. 1994):

> "Under the common law, courts applying the physical impact test developed the 'no-matter-how-slight' standard to prevent sometimes harsh results in near-miss situations. Thus, physical impact was found in some tenuous circumstances. W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 363-64 (5th ed. 1988) ('**"Impact" has meant a slight blow**, a trifling burn or electric shock, **a trivial jolt or jar**, a forcible seating on the floor, dust in the eye, or inhalation of smoke.')[.]"

Bloom, 41 F.3d at 916 fn. 6 (emphasis added).

Accordingly, the Sixth Circuit in *Lukowski* erred in failing to recognize that, under *Gottshall*, even if Blauvelt and Lukowski only suffered a "slight blow," or a "trivial jolt,"

they still suffered a "physical impact" which permits recovery for their severe and debilitating emotional distress.

More recently, in *Nelson v. Metro-North Commuter Railroad*, 235 F.3d 101, 108 (2d Cir. 2000), the Court of Appeals confirmed that "under the traditional rule, **the most minimal of physical injuries suffices to allow a plaintiff to recover essentially unlimited damages for emotional distress flowing from that injury.**" *Nelson*, F.3d at 108 (emphasis added).

For example, the Second Circuit in *Nelson* cited a ruling from Justice Oliver Wendell Holmes, Jr., when he sat on the Massachusetts high court, which concluded that the physical impact rule was satisfied with minor jostling that, as described by *Nelson,* amounted to "**a slight blow from being thrown against a seat.**" *Nelson*, 235 F.3d at 108, citing *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456, 62 N.E. 737, 737 (1902) (Holmes, C.J.) (emphasis added).

The Sixth Circuit made a profound mistake of law in *Lukowski* by failing to recognize that, under *Gottshall*, "physical impact (**no matter how slight**)" is sufficient to trigger liability for negligent infliction of emotional distress under the F.E.L.A.

The Sixth Circuit also profoundly erred in ruling that Lukowski and Blauvelt could only recover based on fear for their own safety which was incurred during the split-second when they apprehended they were in the zone-of-danger. Because Lukowski and Blauvelt were in the zone of danger as a result of CSX's negligence, they can recover for **all** the emotional distress caused, in whole or in part, by this negligence.

The F.E.L.A. expressly and specifically provides that railroad employees can recover for all damages caused, "in whole or in part," by the negligence of their employer. *45 U.S.C. § 51.* However, the Sixth Circuit's opinion in *Lukowski* – concluding that railroad employees can only recover for whatever emotional distress they might feel in fearing for their own safety during the split-second they are in the zone-of-danger – mistakenly misapplied an example which *Gottshall* provided as an illustration of when the zone of danger test would apply.

As articulated in *Gottshall*, the zone-of-danger test authorizes recovery, based on negligent infliction of emotional distress, for those "who are placed in immediate risk of physical harm by that conduct." *Gottshall*, 512 U.S. at 548. Then, quoting a University of Florida Law Review article, the Supreme Court provided an example of how the zone of impact rule would apply: "That is 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot." *Gottshall*, 512 U.S. at 548. The Sixth Circuit in *Lukowski* took this as meaning that Lukowski and Blauvelt could only recover for "fear for his or her own physical safety," while in the zone of danger.

The Supreme Court in *Gottshall*, however, did not state or rule that those within the zone-of-danger can **only** recover for fear for their own safety suffered in the split second of a near collision. After all, the Post-Traumatic Stress caused by a near-collision can occur long after the near-miss, and the F.E.L.A. provides recovery for **all** injuries caused, "in whole **or in part**," 45 U.S.C. § 51, by the employer/railroad's negligence.

The issue in *Gottshall* was "determining under what circumstances emotional distress may constitute 'injury' for

purposes of the statute." *Gottshall*, 512 U.S. at 542. The "easy" decision was the ruling that "emotional distress" constitutes "injury" under 45 U.S.C. § 51. *Gottshall*, 512 U.S. at 550. Then the Court adopted the zone-of-danger rule as being applicable under the F.E.L.A., because it was the most "progressive" rule applied by courts when the F.E.L.A. was enacted. *Gottshall*, 512 U.S. at 554.

Gottshall viewed the common law rules as "outlining the **duty** of defendants with regard to negligent infliction of emotional distress." *Gottshall*, 512 U.S. at 546 (emphasis added). Thus, the zone-of-danger rule delineates the plaintiffs to whom a railroad owes a duty to not negligently inflict emotional distress. For those who were in the zone-of-danger (or who sustained "physical impact"), there is a duty to not negligently inflict emotional distress. And for those who were outside the zone-of-danger (or who suffered no "physical impact"), there is no duty to refrain from negligently inflicting emotional distress.

Once the issue of duty is resolved, those employees who were in the zone-of-danger (like those who suffer "physical impact") get to recover for **all** emotional distress that is caused – "in whole or in part", 45 U.S.C. § 51 – by the negligence of the railroad/employer. Accordingly, contrary to the Sixth Circuit's ruling, the Supreme Court in *Gottshall* did not rule that an employee who was in the zone-of-danger for only a split second can only recover for a split second of fright caused by fear for his or her own safety. Instead, under *Gottshall*, there is a duty to refrain from negligently inflicting emotional distress on an employee who is in the zone-of-danger. And if this duty is violated, an employee who was in the zone-of-danger can recover for all emotional distress caused, "in whole or in part," 45 U.S.C. 51, by the railroad's negligence.

Therefore, under *Gottshall*, an employee who was in the zone-of-danger and who, as a result, suffers from Post-Traumatic Stress Disorder, can recover for all the emotional distress caused by the railroad's negligence – even if this emotional distress manifests itself after the plaintiff is out of the zone of danger. This understanding of *Gottshall* is verified, confirmed and reinforced by the Supreme Court's ruling in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997).

In *Buckley*, the Supreme Court ruled that a railroad employee who is negligently exposed to a hazardous substance (such as asbestos) cannot recover for emotional distress unless and until the symptoms of disease become manifest. *Buckley*, 521 U.S. at 424. This conclusion was reached as an application of the *Gottshall* rule. *Buckley*, 521 U.S. at 428-434.

Based on *Buckley*, symptoms might not manifest, and the employee would not be permitted to recover for emotional distress, until years after the employee leaves the zone-of-danger of being exposed to a hazardous substance. Under *Buckley*, recovery for emotional distress is permitted even if a disease does not manifest itself until years after the plaintiff is out of the zone-of-danger of being exposed to a hazardous substance. And, significantly, nothing in *Buckley* limits the recovery to fear that the plaintiff might have felt for his or her own safety while in the zone-of-danger of being exposed to a hazardous substance.

If the severely stunted interpretation of *Gottshall* applied by the Sixth Circuit in the present case is correct, then the Supreme Court in *Buckley* would have ruled that Buckley could **never** recover for emotional distress, because symptoms of disease or disorder did not become manifest during the

period of time when he was in the zone-of-danger of being exposed to asbestos. Yet the Supreme Court ruled in *Buckley* that the plaintiff can recover for emotional distress under the F.E.L.A. whenever disease or disorder manifests itself.

Under *Gottshall* and *Buckley*, once the issue of duty is resolved, employees who were in the zone-of-danger (plus those who suffer "physical impact") get to recover for **all** emotional distress that is caused – "in whole or in part", 45 U.S.C. § 51 – by the negligence of the railroad-employer.

In *Lukowski*, fear of physical injury while in the zone of danger is merely one element that should have been considered when calculating damages for negligent infliction of emotional distress. Under *Gottshall* and *Buckley*, fear of physical injury while in the zone of danger is not a prima facie element of the cause of action for negligent infliction of emotional distress under the F.E.L.A.

Applying *Gottshall* and *Buckley*, the Sixth Circuit erred in concluding that the *Gottshall* rule only permits recovery for fear of physical injury that is felt while the plaintiff was in the zone of danger. The Supreme Court – having created this problem because of a recognized ambiguity in *Gottshall* – should grant certiorari and eliminate the Sixth Circuit's misunderstanding. Only the Supreme Court can correct the lingering problem with *Gottshall*.

Conclusion

For the reasons set forth herein, and for such other reasons as this Court deems just and appropriate, Petitioners Lukowski and Blauvelt ask this Court to grant this petition for a Writ of Certiorari, reverse the Sixth Circuit's opinion, and remand this case for further proceedings.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-4141

[Filed July 19, 2005]

JAMES R. LUKOWSKI and	)
LESTER J. BLAUVELT,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CSX TRANSPORTATION, INC.;	)
ESTATE OF JOHN D. REESE; and	)
MAURA GOSSARD REESE,	)
Individually and as Administrator of the	)
Estate of John D. Reese,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
Nos. 03-07031; 03-07032
James G. Carr, Chief District Judge

Before: CLAY and SUTTON, Circuit Judges; O'MEARA, District Judge.*

OPINION

CLAY, Circuit Judge. Plaintiffs James R. Lukowski and Lester J. Blauvelt appeal from the district court's grant of summary judgment to Defendants CSX Transportation, Inc., the Estate of John D. Reese, and Maura Gossard Reese as the Administrator of the Estate of John D. Reese, in this tort action arising from a collision between a train and a passenger automobile, brought pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, and Ohio common law. For the reasons that follow, we **AFFIRM** the district court's judgment.

I. BACKGROUND

At all times relevant to this lawsuit, Plaintiffs were employees of CSX Transportation, Inc. ("CSXT"). Around 4:00 p.m. on July 16, 2000, Lukowski was the conductor/brakeman, and Blauvelt the engineer, on a train heading west through Allen County, Ohio. The train approached an "unguarded" crossing at Rumbaugh Road, traveling at a speed of approximately 50 miles per hour, with its whistle blowing and headlights and ditch lights operating

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* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

properly.[1] *There were some tree branches and vegetation next* to or alongside the track that obstructed the train crew's view of the crossing until shortly before the train was about to pass across the road. Right before the train went through the crossing, Blauvelt saw a truck between three and five feet from the tracks, but at that point it was too late for him to stop the train. Similarly, Lukowski saw "a blotch of white" as the train approached the crossing, but was not immediately able to tell that the blotch was a truck.

The train and the truck collided as both attempted to go through the crossing at the same time. During the collision, Blauvelt and Lukowski were jostled around inside the train, but neither was thrown from his seat, and the train did not derail. As the train came to a stop, Blauvelt made an emergency call to report the accident, and sent Lukowski outside the train to investigate. When Lukowski walked back to the crossing, he saw the dead body of the driver of the truck, John Reese ("Reese"). Soon afterward, having not heard anything from Lukowski, Blauvelt also went back to the crossing, and also saw Reese's body.

Both Blauvelt and Lukowski claim to suffer from severe post-traumatic stress disorder as a result of witnessing Reese's body after the accident. It is undisputed that Lukowski was unable to return to work for about seven months following the accident, and that when he did return, he was assigned to a yard job because he feared another accident. Blauvelt was

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[1] An "unguarded" crossing is one in which cautionary signs, a stop line on the road, and standard crossbucks are visible as one approaches the crossing; however, the lighted, motorized gates that are common in busy and heavily populated areas were not installed at the Rumbaugh Road crossing.

also unable to return to work for several months, but he eventually came back as an emergency call center operator. In August 2001, Blauvelt had to stop working entirely due to increasing anxiety and emotional problems.

Tests performed after the accident showed that Reese had a blood alcohol level of .095, and nine empty beer cans were found inside the cab of the truck during a post-accident inventory search.[2] Plaintiffs allege, and Defendants do not dispute, that Reese violated a number of Ohio traffic laws in proceeding through the rail crossing without stopping and looking for a train. Plaintiffs filed the instant lawsuit on July 15, 2002, seeking damages for their emotional injuries. Plaintiffs alleged claims against CSXT under FELA, and Ohio common law claims against the Estate of John D. Reese ("Reese Estate") and Reese's widow, Maura Reese, both individually and as the Administrator of the Reese Estate.[3] Specifically, Plaintiffs claimed that their emotional injuries were a direct and proximate result of Reese's negligence, and, additionally, that Maura Reese was individually liable for the accident because she negligently entrusted her husband with

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[2] In Ohio at the time of the accident, the legal limit for driving under the influence of alcohol was .10. Ohio has since amended the law, and the legal limit is now .08. *See* Ohio Rev. Code § 4511.19 (A)(1)(d).

[3] Jurisdiction against CSXT is premised on federal question jurisdiction under 28 U.S.C. § 1331. Plaintiffs are citizens of Indiana, the Reese Estate and Maura Reese are citizens of Ohio, and CSXT is a Virginia corporation with its principal place of business in Jacksonville, Florida; therefore, there is complete diversity of citizenship between the parties, and jurisdiction against the Reese Estate and Maura Reese is premised on 28 U.S.C. § 1332.

the truck when she knew or should have known that he would operate it under the influence of alcohol. Plaintiffs claimed that CSXT was at fault for failing to properly maintain vegetation and trees along the right-of-way, which obstructed Plaintiffs' view of the Rumbaugh Road crossing until it was too late for them to safely stop the train.

This suit was initially filed in United States District Court for the Northern District of Indiana, but venue was transferred to the Northern District of Ohio in January 2003. After the transfer of venue, Defendants moved for summary judgment. Without addressing the merits of Plaintiffs' claims against the Reese Estate and Maura Reese as Administrator, the district court found that the Estate and Mrs. Reese were entitled to summary judgment because Plaintiffs failed to follow the estate claim notification procedures set forth in Ohio Rev. Code § 2117.06. The court also granted summary judgment to Maura Reese on the merits of the negligent entrustment claim against her, finding that there was no genuine issue of material fact on the question of whether Mrs. Reese knew or should have known that her husband was intoxicated on the afternoon of the accident, or that he had a propensity to drive while intoxicated. Finally, the court granted CSXT's motion for summary judgment, holding that under FELA, a plaintiff may only recover for emotional injuries that result from a fear of physical injury to his or her own person. *See Lukowski v. CSX Transp., Inc.*, 332 F. Supp. 2d 1065, 1068 (N.D. Ohio 2004). The court found that rather than making a claim that their emotional distress was a result of their fear for personal physical injury, Plaintiffs claim that they suffered emotional distress due to a fear for Reese's physical safety. *Id.* ("Plaintiffs have neither alleged nor shown that the emotional consequences of the accident resulted from any apprehension of possible injuries to themselves. On the contrary, they attribute the disabling

consequences of the accident to what they saw in its aftermath, and a sense of guilt at not having been able to see the truck and stop the train."). According to the district court, such emotional distress is not cognizable under FELA in light of the Supreme Court's decision in *CONRAIL v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). *Id.* at 1068-69. Plaintiffs now appeal the district court's grant of summary judgment to CSXT, the Reese Estate, and Maura Reese as Administrator of the estate only.

II. DISCUSSION

A. Emotional Distress Claims Under FELA

This case presents a matter of first impression in this circuit: whether a plaintiff who is within the "zone of danger" may recover damages under FELA for emotional distress suffered not as a result of fear for personal physical safety, but rather, as a result of witnessing a third party's peril. The district court answered that question in the negative, but Plaintiffs argue that because they were in the zone of danger, they are automatically entitled to recover for any emotional injuries resulting from CSXT's negligence, regardless of the cause of the emotional distress. We review the district court's grant of summary judgment *de novo*. *Moorer v. Baptist Mem. Hosp.*, 398 F.3d 469, 486 (6th Cir. 2005). Additionally, as a purely legal issue, we review the district court's interpretation of FELA *de novo*. *See, e.g.*, *Shanklin v. Norfolk S. Ry. Co.*, 369 F.3d 978, 985 (6th Cir. 2004); *United States v. Graham*, 327 F.3d 460, 464 (6th Cir. 2003).

The starting point for any analysis of emotional distress claims under FELA is the Supreme Court's decision in *Gottshall*. In *Gottshall*, the Court held that in order to recover emotional distress damages under FELA, a plaintiff must

demonstrate that he or she was within the "zone of danger" of physical impact. *Gottshall*, 512 U.S. at 555-56. This is so because Congress' purpose in adopting FELA was "to provide compensation for the injuries and deaths caused by the physical dangers of railroad work." *Id.* at 555. Thus, "FELA was (and is) aimed at ensuring 'the security of the person from physical invasions or menaces.'" *Id.* at 555-56 (quoting *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 813 (7th Cir.), *cert. denied*, 480 U.S. 945, 107 S. Ct. 1602, 94 L. Ed. 2d 788 (1987)). However, even though the goal of FELA is compensation for physical injuries, the statute "refers simply to 'injury,' which may encompass both physical and emotional injury." *Id.* at 556. Balancing the statute's goal and its broad language, the common law "zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, those within the zone of danger of physical impact can recover for fright, and those outside of it cannot." *Id.* at 547-48 (quotation and citation omitted); *see Szymanski v. Columbia Transp. Co.*, 154 F.3d 591, 594 (6th Cir. 1998) (*en banc*) (explaining that *Gottshall* "held that claims essentially based on infliction of emotional distress must meet the common law 'zone of danger' rule, requiring that a plaintiff making such a claim suffer a physical impact, or be in the zone of danger of suffering such an impact"). The *Gottshall* Court summed up its holding as follows:

> Under this test, a worker within the zone of danger of physical impact will be able to recover for *emotional injury caused by fear of physical injury to himself*, whereas a worker outside the zone will not. Railroad employees will thus be able to recover for injuries--physical and emotional--caused by the negligent

> conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting [FELA] of alleviating the physical dangers of railroading.

Gottshall, 512 U.S. at 556 (emphasis added).

The district court concluded that Plaintiffs were at least arguably within the zone of danger, a conclusion that we assume to be correct. Plaintiffs were operating the train during the collision, and they were jostled around in their seats, which caused minor physical injury. Thus, Plaintiffs sustained a slight physical impact, and due to the nature of the accident, they were also placed in immediate risk of physical harm. However, because *Gottshall* plainly uses the phrase "emotional injury caused by physical injury to himself," the district court concluded that recovery is limited to emotional distress damages suffered as a result of a fear for one's own physical safety.

While the language of *Gottshall* is apparently clear in its limitation of emotional distress damages, there is a dearth of case law discussing the issue presented here. Like this Court, no other Circuit has addressed the question of whether emotional distress damages under FELA must be tied to a fear for personal physical safety. On remand from the Supreme Court in *Gottshall*, the Third Circuit specifically left the question open. *See Gottshall v. CONRAIL*, 56 F.3d 530, 535 n.7 (3rd Cir. 1995) (noting that "it is not clear whether a plaintiff would be required, in a FELA action for negligent infliction of emotional distress, to fear physical injury to himself as a prima facie element or whether the lack of such fear would merely be considered in determining damages"); *accord Bloom v. Consol. Rail Corp.*, 41 F.3d 911, 915 n.4 (3d Cir. 1994). The district court in the instant case relied on

the Northern District of Indiana's decision in *Marschand v. Norfolk and Western Railway Co.*, 876 F. Supp. 1528 (N.D. Ind. 1995), *aff'd.* 81 F.3d 714 (7th Cir. 1996), which holds that only emotional injuries resulting from a threat of imminent physical harm to the plaintiff are recoverable under FELA. The *Marschand* court reasoned that such recovery "is appropriate because the employee's injury is the proximate result of the Railroad's breach of a duty owed directly to the employee," whereas "emotional damages caused by witnessing harm or peril to another . . . are not caused by a breach of duty owned to the employee-plaintiff. Rather, they arise as a result of the railroad's independent and separate breach of duty owed to the injured third person." 876 F. Supp. at 1535-36 (citations omitted).

In contrast to *Marschand*, the Kansas Supreme Court has held that a plaintiff within the zone of danger may recover damages under FELA for emotional distress suffered as a result of witnessing a third party's peril, so long as the plaintiff also suffers emotional injury resulting from a fear for his or her own safety. *See Grube v. Union Pacific R.R. Co.*, 256 Kan. 519, 886 P.2d 845, 851 (Kan. 1994) ("We also agree that the entire damages may include emotional distress resulting from concern or fear for the safety of another person as long as plaintiff establishes that he or she suffered imminent apprehension of physical harm."). *Grube* interpreted *Gottshall* to hold that the "essential elements for recovery under the zone of danger test are that plaintiff be within the zone of danger and suffer imminent apprehension of physical harm which causes or contributes to the emotional injury." *Id.* The *Grube* court ultimately denied recovery to the plaintiff because although he was within the zone of danger, he failed to establish that his emotional injuries resulted in whole or in part from a fear for his own physical safety. *Id.*

Plaintiffs do not point to any case, nor were we able to find one, which does not hold that fear for personal physical safety is an essential element of an emotional distress claim under FELA. Given *Gottshall*'s explicit reference to "emotional injury caused by fear of physical injury to himself," we hold that in order to recover damages for emotional distress under FELA, the plaintiff must demonstrate that his or her emotional injury results from a fear for his or her own physical safety. Our holding is further supported by *Gottshall*'s reminder that the primary purpose of FELA is compensation for physical injuries and deaths caused by railroad work. *See Gottshall*, 512 U.S. at 556. Because it is unnecessary for us to decide, we leave open the question of whether emotional distress damages must be solely the result of fear for personal safety, *e.g.*, the *Marschand* rule, or whether recoverable emotional distress damages may only partially be the result of fear for one's own safety, *e.g.*, the *Grube* rule. It is unnecessary for us to answer this question because Plaintiffs have not alleged or demonstrated that their emotional injuries were caused by anything other than seeing Reese's body after the accident. *See Lukowski*, *supra*, 332 F. Supp. 2d at 1068. Therefore, Plaintiffs cannot recover emotional distress damages under FELA, and the district court properly granted judgment in favor of CSXT.

B. Ohio Common Law Claims

"A federal court sitting in diversity applies the substantive law of the state in which it sits." *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 566 (6th Cir. 2001) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 820 (6th Cir. 1990)). In the instant case, the parties agree that Ohio law governs Plaintiffs' claims against the Reese Estate and Maura Reese. The district court

held that under the plain terms of Ohio Rev. Code § 2117.06, Plaintiffs' claims are barred because they were not presented to Mrs. Reese, as administrator of the estate, within the time allotted in the statute. We review the district court's grant of summary judgment *de novo*. *Moorer*, *supra*, 398 F.3d at 486.

Section 2117.06 provides, in relevant part,

> (A) All creditors having claims against an estate, including claims arising out of . . . tort . . . shall present their claims in one of the following manners:
>
> > (1) To the executor or administrator in a writing;
> >
> > (2) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;
> >
> > (3) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section . . .
>
> (B) All claims shall be presented within one year after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that one-year period. Every claim presented shall set forth the claimant's address.
>
> (C) A claim that is not presented within one year after the death of the decedent shall be forever barred as to all parties, including, but not limited to, devisees,

> legatees and distributees. No payment shall be made on the claim and no action shall be maintained on the claim, except as otherwise provided in sections 2117.37 to 2117.42 of the Revised Code with reference to contingent claims . . .

Ohio Rev. Code § 2117.06 (2002) (version in effect at time of accident). Plaintiffs notified National Insurance, the insurer of the vehicle that Reese was driving at the time of the accident, of their claim against the estate within one year of the date of Reese's death. It is undisputed, however, that Plaintiffs did not serve notice on Mrs. Reese as the administrator of the estate until filing the instant lawsuit nearly two years after Reese's death.

In general, presentation of notice to an insurance company is insufficient to comply with § 2117.06's requirement that notice be provided to the executor or administrator of the estate. *See, e.g., Beacon Mut. Indem. Co. v. Stalder*, 95 Ohio App. 441, 120 N.E.2d 743, 747 (Ohio Ct. App. 1954) ("The statute places the burden upon the *claimant* to present his claim . . . . If he fails to do so within the time provided, his rights are lost. There is no duty imposed upon the administrator in this respect, except to receive the written claim, and, in proper time, to officially act upon it. This duty cannot be delegated to another.") (emphasis in original). The Ohio Supreme Court has held that where a plaintiff does not seek to recover from the assets of the estate, but only seeks recovery from the proceeds of a liability insurance policy covering the decedent, compliance with § 2117.06 is unnecessary. *See Meinberg v. Glaser*, 14 Ohio St. 2d 193, 237 N.E.2d 605 (Ohio 1968). In *Meinberg*, the plaintiff was injured in an automobile accident that was proximately caused by the decedent's negligence, and filed suit against the estate

seeking recovery from the decedent's liability insurance policy. The court specifically stated that

> where it is alleged in an action for bodily injuries and property damage that such injuries and damage were proximately caused by the negligence of a decedent and that he had a policy insuring him against liability for such negligence and it does not appear that any other claims covered by such insurance have been asserted, such action may be brought against the executor or administrator of such decedent at any time within two years after the cause thereof arose without presenting a claim against the estate within the . . . time specified in Section 2117.06 . . .

Id. at 609.

Plaintiffs argue that *Meinberg* is applicable here, and that they were therefore not required to present notice of their claim to Mrs. Reese as administrator within one year of Reese's death. However, *Meinberg* makes clear that "a plaintiff who seeks to avoid the claim requirements and the . . . time limitations of Section [] 2117.06 . . . *must allege and prove* that there is something other than an asset of the estate, such as liability insurance, against which any judgment rendered in his favor may be enforced." *Id.* at 609-10 (emphasis added). In this case, Plaintiffs did not allege in their complaint that they seek recovery only from an insurance policy that covered Reese; in fact, their complaint does not mention an insurance policy at all, it simply demands compensation for each Plaintiff in excess of $200,000 in compensatory damages, plus at least $750,000 in punitive damages. Additionally, in contrast to their current position, in their memorandum of law in opposition to the Reese Estate's motion for summary judgment, Plaintiffs argued that

the insurance policy on the truck Reese was driving at the time of the accident was taken out in Maura Reese's name and listed Mrs. Reese as the driver of the truck. Plaintiffs also stated in their memorandum that "nowhere" on the insurance policy "does John D. Reese's name appear." Joint Appendix, "J.A." at 231. If that assertion is true, then it is unclear whether the liability insurance policy that Plaintiffs claim to seek recovery from even covered John Reese at all.

Furthermore, before the district court, Plaintiffs merely argued that by giving notice to the insurance company, they complied with § 2117.06, an argument that the district court correctly found is foreclosed under Ohio law. *See Stalder*, 120 N.E.2d at 747. Now, for the first time on appeal, Plaintiffs argue that under *Meinberg* they were not required to submit a claim to the administrator of the Reese estate, because they are seeking to recover solely from an insurance policy. We hold that Plaintiffs cannot take advantage of *Meinberg*, because they did not allege, much less attempt to prove, to the district court that they seek recovery solely from a liability insurance policy that covered Reese, and not from assets of the Reese Estate. *See United States v. Ninety Three Firearms*, 330 F.3d 414, 424 (6th Cir. 2003) (quoting *In re Hood*, 319 F.3d 755, 760 (6th Cir. 2003)) ("This court has repeatedly held that it 'will not consider arguments raised for the first time on appeal unless our failure to consider the issues will result in a plain miscarriage of justice.'"); *see also Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 915 (6th Cir. 2002) ("Normally, an issue not raised below may not be raised on appeal."). Because Plaintiffs failed to argue below that the recovery they seek is limited to the proceeds of a liability insurance policy that covered Reese, the district court did not err in granting summary judgment to the Reese Estate and Maura Reese as

Administrator of the estate on the basis of Plaintiffs' failure to comply with § 2117.06.

III. CONCLUSION

For the above reasons, we **AFFIRM** the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:03CV7031, Consol No. 3:03CV7032

[Filed August 13, 2004]

James R. Lukowski, et al., Plaintiff	)
v.	)
CSX Transportation, Inc., et al., Defendant	)

James G. Carr, United States District Judge

ORDER

This is an FELA case in which the plaintiffs, crew members of a CSX Transportation train, seek to recover for injuries sustained in a fatal grade crossing accident. Plaintiffs' claims against the estate of the decedent, who drove a pickup truck and trailer into the train's path, and the estate's administrator have been dismissed on a motion for summary judgment filed by those defendants. Pending is a motion for

summary judgment filed by the railroad. For the reasons that follow, the motion shall be granted.

The driver who was killed in the collision, John D. Reese, was proceeding north on Rumbaugh Road in Allen County, Ohio, at about 4:00 p.m. on July 16, 2000. The road's crossing with a CSX single line track, which runs East to West, was "unguarded": i.e., only cautionary signs, a stop line in the pavement, standard crossbucks, and a sign warning of increased train traffic would be seen as a motorist approached the crossing.

Plaintiffs' train was proceeding from East to West at fifty miles per hour. Its warning equipment - horn, whistle, and ditch lights - was operating properly. As they approached the crossing, plaintiffs noticed "a blotch of white," "a "flash of light" headed toward the crossing; they did not, however, apprehend that the decedent's truck would be entering their path until it had begun to cross at an estimated five miles per hour. At that point, the plaintiffs could not slow their train sufficiently to avoid the collision.

As they came toward the crossing, plaintiffs' view to the south of Rumbaugh Road was obscured by buildings on the adjacent property. In addition, branches and leaves of a large tree on that property hung over the right of way, though not in the path of the train. According to the plaintiffs, if they had been able to see the decedent's truck sooner, they would have been able to stop the train before colliding with it.

On impact, both plaintiffs were bounced around. Neither was physically injured, aside from some minor bruises that did not require medical attention. Thus, while there was some physical impact between the plaintiffs and their locomotive at

the time of the collision, neither plaintiff was physically injured as a result of that impact.

Once the train, which had been placed into emergency braking just before the collision, stopped, the conductor, plaintiff James Lukowski, went back to the crossing to investigate. He saw the wreckage of the truck and trailer and Reese's decapitated body. When Lukowski did not return to the locomotive, plaintiff Lester Blauvelt went back to the crossing, where he encountered Lukowski in shock and saw what he had seen.

Photos of the scene taken the following day show that the view of the crossing was not, contrary to plaintiffs' contentions and those of their expert, who viewed the scene nearly four years after the accident, obstructed by vegetation. As noted, though, buildings and the overhanging branches of a large tree obscured the view as the locomotive approached.

Discussion

Plaintiffs claim that the railroad is liable under the FELA because it failed to control vegetation along the right of way approaching the crossing and properly construct, maintain, and repair the crossing, and notify the crew of the existence of dangerous conditions before and at the crossing.[1] In

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[1] Plaintiffs have split their claim concerning failure to remove vegetation into several contentions. Those manifold expressions of plaintiffs' complaint about the vegetation and their obscured view raise, in essence, a single claim: namely, that the railroad had a duty, which it breached, to control the vegetation so that vehicle traffic approaching from the South could be observed in sufficient time to enable the crew to respond to any dangers posed by such traffic.

addition, plaintiffs contend that the warning devices alerting motorists to the crossing were not properly placed.[2]

To the extent that plaintiffs contend that the railroad failed to control vegetation other than the overhanging branches, they cannot prevail. The photos taken the day after the accident show indisputably that trackside vegetation was properly controlled, and that such control met the standards established under FELA and Ohio law.

A jury could find, however, that, as alleged by plaintiffs, their view was, in fact, obstructed by the untrimmed branches hanging over the railroad's right of way. To be sure, there were other obstructions (namely, the buildings on the adjacent property), but the extent to which the view of approaching traffic was limited by those structures, on the one hand, and the branches, on the other, is not clear in the record. For now, that suffices to raise a genuine issue of material fact with regard to the extent to which, due to the branches hanging over the right of way, plaintiffs were not able to see the decedent's truck as it neared the crossing.[3]

---

[2] Plaintiffs' complaint contains several other claims. Because plaintiffs have not responded to the defendant's motion for summary judgment as to those claims, those claims are subject to dismissal without further discussion.

[3] Defendant has not shown that it did not have a duty to clear its right of way of obstructions which, though located on adjacent property, impeded the view of its crew members. Under Fed. R. Civ. P. 56(c), the defendant has the burden, at this stage, of showing that it is entitled to judgment as a matter of law. It has not done so; were there to be a trial plaintiffs would have the burden of showing that the railroad had such duty.

In this case plaintiffs are not seeking to recover for physical injuries from the accident. They claim, rather, that Reese's death and the sight of his headless body have caused severe post traumatic stress and entitle them to recover damages for their emotional distress.

The Supreme Court held in *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), that damages for emotional distress under the FELA are premised on the "zone of danger" test. This standard

> limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot."

Id. at 547-48 (citation omitted).

In this case, the plaintiffs sustained a minor physical impact without any resulting physical injury. At least arguably, they were within the "zone of danger" - i.e., an area in which they might have apprehended a risk of physical injury to themselves as a result of colliding with the

---

To the extent that plaintiffs assert that the crossbucks and other warning signs may have been misplaced, no jury could find that such misplacement more likely than not caused the accident. There is simply no reason to believe that the slight corrections in placement that might have been needed to have the warnings conform to statutory or regulatory requirements would have caused the decedent to stop.

decedent's truck. Thus, for purposes of this decision, I deem their claim to come within the *Gottschall* rule.

Recovery on such claim depends, however, on a showing that the emotional injuries resulted from a fear for one's own safety, rather than for the safety of others. As stated in *Gottschall,* "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." 512 U.S. at 556; *see also Marschand v. Norfolk and Western Ry. Co.*, 876 F. Supp. 1528, 1537 (N.D. Ind. 1995) (plaintiff can "recover only for. . .emotional distress caused by fear for his own safety.").

Plaintiffs have neither alleged nor shown that the emotional consequences of the accident resulted from any apprehension of possible injuries to themselves. On the contrary, they attribute the disabling consequences of the accident to what they saw in its aftermath, and a sense of guilt at not having been able to see the truck and stop the train.

I conclude, accordingly, that the plaintiffs cannot prevail on their FELA claim against the railroad, even if the railroad wrongfully failed to remove an overhanging obstruction of their view as they approached the intersection. Though the plaintiffs sustained a minor physical impact, and may have been within the zone of danger created by that collision, their resulting emotional injuries did not arise as a result of a fear of harm to themselves.

Conclusion

It is, accordingly,

ORDERED THAT defendant's motion for summary judgment be, and the same hereby is granted.

So ordered.

/s/ _____
James G. Carr
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:03CV7031

Lester J. Blauvelt,	)
James R. Lukowski, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CSX, et al.,	)
Defendants.	)
	)

James G. Carr, United States District Judge

Deposition of LESTER J. BLAUVELT, a Plaintiff herein, called by the Defendants as if upon Cross Examination under the Federal Rules of Civil Procedure, taken before me, the undersigned, Philip H. Gaines, a Notary Public in and for the State of Ohio, pursuant to Notice and stipulations of Counsel as hereinafter set forth, at the offices of Anspach, Serraino, Meeks & Nunn, 300 Madison Avenue, 1600 Edison Plaza, Toledo, Ohio, on Thursday, August 14, 2003, commencing at 12:20 p.m.

* * * * *

[p.47]

gates come down way too early anyway and, you know, they're just beating each other to death to get through there. There's nothing you can do about it.

Q. You're approaching the crossing, your headlight's on bright, your bell is ringing, your ditch lights are operating?

A. Correct.

Q. And from what you said, you put it in emergency on impact or basically at impact?

A. As soon as I could, right.

Q. What occurred on impact?

A. Well, a lot of noise, jostled around a little bit. You know, a lot of fear.

Q. Your first crossing accident?

A. Yes, sir.

Q. Your locomotive didn't derail?

A. No, it didn't.

Q. You were not thrown out of the seat?

A. Not completely.

Q. When you say "not completely," tell me, tell me what you --

A. Well, I was like jostled around a little bit inside the seat and it was a [p.48] console-type locomotive or desktop rather where everything's in front of you and you're right up on it, and it just jostled me around. I really can't describe how. It just happened so quick.

Q. As you approached the crossing, any conversation between you and Mr. Lukowski?

A. Pertaining to?

Q. Well, did anybody say look out, this one's not going to stop or --

A. We didn't know, no, nothing.

Q. I think you indicated that you put it in emergency, and I think you told somebody that you bailed off later because you had a short train?

A. Well, the reason I think I bailed off was my train was stretched out, the size of the train and all that I don't think I -- train rules, when you put a train in a -- when a train goes in emergency or you put one in emergency, if it's stretched out you bail the front end to keep the train stretched and if it's bunched up, you leave the brakes on. Well, my train was stretched...

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:03CV7031

Lester J. Blauvelt,	)
James R. Lukowski, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CSX, et al.,	)
Defendants.	)
	)

James G. Carr, United States District Judge

Deposition of JAMES R. LUKOWSKI, a Plaintiff herein, called by the Defendants as if upon Cross Examination under the Federal Rules of Civil Procedure, taken before me, the undersigned, Philip H. Gaines, a Notary Public in and for the State of Ohio, pursuant to Notice and stipulations of Counsel as hereinafter set forth, at the offices of Anspach, Serraino, Meeks & Nunn, 300 Madison Avenue, 1600 Edison Plaza, Toledo, Ohio, on Thursday, August 14, 2003, commencing at 4:00 p.m.

* * * * *

[p.19]

threw it into emergency. I grabbed the radio immediately, picked it up, started making emergency response calls, turned around, seen the truck spinning around and was waiting for the -- was waiting for the train to stop.

Q. I take it your train eventually came to a stop?

A. Yes.

Q. Do you know how far from the crossing your train came to a stop?

A. I honestly don't remember.

Q. Did you actually stop fairly quickly?

A. I wouldn't say fairly quickly. At the time it seemed like it took forever, but going 50 miles an hour with 20 cars it's not going to stop quickly.

Q. But you got on the radio to call emergency before you came to a stop?

A. Yes, I believe so.

Q. When you said you were jostled around, were you thrown out of your seat at all?

A. Not thrown out but I mean I was -- I was jostled around back and forth from the [p.20] impact, and then from

throwing the train into emergency, the slack runs in on the cars.

Q. After the train came to a stop, what did you do then?

A. Once the train had come to a stop I believe I was still talking to the dispatcher letting the dispatcher know what was going on. The dispatcher was asking us whether we were okay, then I stopped talking to him, gave the mic to Les and got off the engine and ran back to the back of the train.

Q. How far did you get before you met somebody else?

A. Before I met another person, I was at the end of the train. I was -- a couple cars passed the end of the train. There was -- there's houses there on both sides of the street and the people from both houses had come out and were gathered around the truck, and once they saw me coming up along the end of the train, one of the guys that lived in one of the houses had started to

* * * * *

[p.48]

to your old type of job anytime in the future?

A. To where I'm back to running a road train?

Q. Correct.

A. No.

Q. Now with respect to your physical injuries, did you ever have anything more than just a little sore back the next day after this accident?

A. No.

Q. And I take it your emotional trauma, that's all from seeing this collision with the pickup truck and the fact that the driver died?

A. Correct, and actually visually seeing the dead body.

MR. METUSALEM: Okay. I think that's all I have. Thanks.

MR. ELLENBERGER: Nothing further.

(Whereupon, the deposition was concluded at 5:40 p.m.).

2

DEC 19 2005

No. 05-497

IN THE

Supreme Court of the United States

JAMES R. LUKOWSKI AND LESTER J. BLAUVELT,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly ruled, as this Court held in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994), that a plaintiff in a FELA case can only "recover for emotional injury caused by fear of physical injury" to the plaintiff rather than to a bystander.

CORPORATE DISCLOSURE STATEMENT

Respondent CSX Transportation, Inc. has the following parent corporation:

CSX Corporation.

No other publicly held company owns 10% or more of its stock.

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STATUTE

45 U.S.C. § 51 *et seq* 1

BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. (hereinafter CSX) hereby opposes the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

This action arose from a fatal collision between a CSX train and a truck. The driver of the truck was John Reese. The CSX train was operated by petitioners, Lester J. Blauvelt and James R. Lukowski, the engineer and conductor of the train, respectively. The accident took place at approximately 4:00 p.m. on July 16, 2000, at a grade crossing over CSX's railroad track in Allen County, Ohio. Petitioners suffered minor bruises, but otherwise were unharmed.[1] The train did not derail. Both petitioners, sometime subsequent to the collision, however, observed the dead body of the truck driver, which they alleged caused each petitioner to suffer emotional injury.

Petitioners filed suit in the United States District Court for the Northern District of Indiana. Each petitioner filed separately against CSX and against the estate of the truck driver.[2] The matters were transferred to the Northern District of Ohio and all of the complaints were consolidated.

Petitioners brought suit against CSX under the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq*. FELA is the exclusive remedial scheme for practically all railroad workplace injuries. Because of FELA, there is no worker's compensa-

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[1] Neither Petitioner sustained any treatable physical injury as a result of the collision and only petitioner Blauvelt alleged a minor bruise, which went untreated and which petitioner Blauvelt could not positively relate to the collision.

[2] The claims against the estate were dismissed as untimely filed and that issue is not before this Court.

tion program for railroad employees, *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Fergerson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting). But "FELA 'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947)).

Petitioners' theory of liability was that the railroad acted negligently by allowing vegetation at the crossing to impair their line of sight and that petitioners were unable to stop the train in time to prevent the accident. The court noted that the grade crossing was obscured from petitioners' sight by a building and that there was some vegetation as well.[3] Although the warning equipment – horn, whistle and lights – operated properly, it is unclear why the decedent failed to heed the warnings at the crossing or to respond to the warnings from the train.[4] Regardless, the train struck the truck and Reese was killed. Pet. App. 17a. According to the district court, petitioners suffered minor bruises that did not require any medical attention. Both petitioners, sometime subsequent to the collision, did observe the truck driver, Reese's decapitated body, and as a consequence, suffered what they alleged was severe emotional distress. *Id.* at 17a-18a.

Petitioners' assertion that the railroad grade crossing at issue was unprotected is erroneous and contrary to the facts in the case. The crossing at issue had all required warning devices, including standard crossbucks, in place at the time of

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[3] The district court observed that the pictures taken at the scene showed that the view from the train of "the crossing was not, contrary to plaintiffs' contentions and those of their expert, . . . obstructed by vegetation." Pet. App. 18a.

[4] The court of appeals noted that there were nine empty beer cans in the cab of Reese's truck and that his blood alcohol level was barely below the then-legal limit for driving under the influence and that he would have been under the influence under the standard in effect at the time of the court of appeals' decision. Pet. App. 4a & n.2.

the accident, all of which were installed using federal funds. Accordingly, any such claims relating to the adequacy of the warning devices are preempted under *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000) and its progeny.

On these undisputed facts, the district court entered judgment for CSX. The court recognized that petitioners' emotional claims were governed by this Court's decision in *Gottshall*. The court read *Gottshall* as requiring a plaintiff who has suffered an impact and/or been in the "zone of danger" to be entitled to recover emotional injuries caused by "a fear for one's own safety, rather than for the safety of others." Pet. App. 21a. Because petitioners neither alleged nor showed that any emotional consequences of the accident were caused by fear for their own safety, as opposed to what they saw in the aftermath of the accident, they did not state a claim for recovery.

The court of appeals affirmed unanimously. Pet. App. 1a-15a. The court posed the issue as whether a plaintiff "may recover damages under FELA for emotional distress suffered not as a result of fear for personal physical safety, but rather, as a result of witnessing a third party's peril." *Id.* at 6a. The court observed that "there is a dearth of case law discussing the issue presented." *Id.* at 8a. But based on the underlying purpose of FELA and this Court's specific reference to "'fear of physical injury to himself'" – referring to the individual worker – the court below held that petitioners "cannot recover emotional distress damages under FELA." *Id.* at 10a.

REASONS FOR DENYING THE PETITION

1. The decision of the court of appeals faithfully applies this Court's holding in *Gottshall*, conflicts with no decision of any other court – state or federal – and presents no issue otherwise warranting this Court's review. Accordingly, certiorari should be denied.

In *Gottshall*, this Court stated quite plainly that "a worker in the zone of danger of physical impact will be able to recover for emotional injury caused *by fear of physical injury to himself*." 512 U.S. at 556 (emphasis added). The court of appeals applied this statement directly to petitioners' alleged claims and dismissed them because petitioners did not allege an injury caused by fear for their own safety. Their emotional injuries arose solely out of the injuries to the deceased truck driver.

As the court below observed: "Plaintiffs have not alleged or demonstrated that their emotional injuries were caused by anything other than seeing Reese's body after the accident." Pet. App. 10a. Accordingly, the decision below is completely faithful to this Court's statement of the law in *Gottshall*.

2. Moreover, the Sixth Circuit's decision is fully consistent with every lower court decision applying *Gottshall*. Indeed, petitioners do not even assert that any kind of a conflict exists.

All they claim is an alleged "ambiguity" in this Court's opinion as to whether it really meant what it said, *viz.* that there must be a causal connection between the injury or risk of injury and the claim of emotional harm. But, even if there were ambiguity, which is not self-evident, it creates no problem in the narrow circumstance posed here. Thus, if petitioners had alleged that they feared for their lives or safety during the collision and that this fear caused emotional injury, that would be a very different case. But without any emotional injury whatsoever arising from either their actual injury or their fear of personal injury, petitioners are not entitled to recover for the alleged harm arising from seeing Reese's dead body.

As the court of appeals correctly recognized: "Plaintiffs do not point to any case, nor were we able to find one, which does not hold that fear for personal physical safety is an essential element of an emotional distress claim under FELA."

Pet. App. 10a.[5] Given the clarity in this Court's statement in *Gottshall*, it is not surprising that no other court has allowed recovery in the circumstances presented here.

Petitioners criticize (Pet. 6-7) the court of appeals for not taking into account their claim that they sustained a "physical impact." But the court expressly acknowledged that they "sustained a slight physical impact." Pet. App. 8a. The court also correctly recognized that whether there was a physical impact or whether they were in the zone of danger, they still cannot recover unless their emotional injury was caused by fear for their own safety or by the physical injury itself. *Id.* Thus, petitioners' criticism is misplaced and in any event provides no basis for review by this Court.

Petitioners quote (Pet. 5), *Bloom v. Conrail*, 41 F.3d 911, 915 n.4 (3d Cir. 1994), for the unexceptional proposition that it is unclear whether fear for one's own safety is an element of a claim or just a part of damages, but *Bloom* clearly does not hold that fear for one's own safety is completely unnecessary to recover emotional injuries.

Nor does *Nelson v. Metro-North Commuter Railroad*, 235 F.3d 101 (2d Cir. 2000), aid petitioners (Pet. 8). To the contrary, the *Nelson* court recognized that the emotional distress must "flow[] from that injury." 235 F.3d at 108. Petitioners' emotional claims do not flow from their alleged bruises; they

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[5] The court below (Pet. App. 9a) did recognize a difference of opinion between the Kansas Supreme Court in *Grube v. Union Pacific Railroad*, 886 P.2d 845, 851 (Kan. 1994), and a district court in *Marschand v. Norfolk & Western Railway*, 876 F. Supp. 1528, 1535-36 (N.D. Ind. 1995), *aff'd*, 81 F.3d 714 (7th Cir. 1996), *abrogation on other grounds recognized by Coleman v. Keebler Co.*, 997 F. Supp. 1102 (N.D. Ind. 1998). But the difference involves whether a FELA plaintiff is ever entitled to recover damages to injuries caused by witnessing harm to a third person. The court below did not decide that issue because petitioners here could not recover under either *Grube* or *Marschand*. Accordingly, that split in authority, which still would not warrant this Court's review, is clearly not posed here.

flow from witnessing Reese's body. That claim of causation is too attenuated under *Gottshall* and all lower courts agree.

* * * *

At the end of the day, it seems quite improbable that any court of appeals or state supreme court will ever interpret *Gottshall* to allow recovery for petitioners' very narrow claims. But it is quite clear that until some court does, there is no basis for this Court's review of the question presented in the petition in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 19, 2005

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Supreme Court, U.S.
FILED
JAN 11 2006
OFFICE OF THE CLERK

(3)

No. 05-497

In the Supreme Court of the United States

JAMES R. LUKOWSKI AND
LESTER J. BLAUVELT,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Statute

45 U.S.C. § 51 5

The simple but critical question presented by this case is whether – as the Sixth Circuit concluded – the Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), drastically altered the traditional "physical impact" test so that the plaintiff in an F.E.L.A. case can only recover for emotional injury "caused by **fear of physical injury to himself**[.]" *Lukowski v. CSX*, 416 F.3d 478, 483-84, quoting *Gottshall*, 512 U.S. at 556 (emphasis added).

There is no dispute that Lukowski and Blauvelt sustained "physical impact" when their locomotive collided with a pickup truck. The Court of Appeals acknowledged that Lukowski and Blauvelt sustained physical impact as a result of the collision. As the Sixth Circuit recounted:

> "Plaintiffs were operating the train during the collision, and they were jostled around in their seats, which **caused minor physical injury**. Thus, Plaintiffs sustained a slight **physical impact**, and due to the nature of the accident, they were also placed in immediate risk of physical harm."

Lukowski, 416 F.3d at 482-83 (emphasis added).

There is also no legitimate dispute that Lukowski and Blauvelt presented sufficient evidence that one cause of this collision was the Railroad's negligence in violating a vegetation control regulation. See *Lukowski v. CSX Transportation, Inc.*, 332 F.Supp.2d 1065, 1068 (N.D. Ohio 2004). Accordingly, under the traditional "physical impact" test – adopted by *Gottshall* as part one of the two-alternative zone-of-danger test – Lukowski and Blauvelt should have been allowed to recover for all the emotional injuries caused by the Railroad's negligence. As *Gottshall* explained:

> "**[T]he zone of danger test** limits recovery for emotional injury to those plaintiffs who sustain a **physical impact** as a result of a defendant's negligent conduct, **or** who are **placed in immediate risk of physical harm** by that conduct."

Gottshall, 512 U.S. at 547-48 (emphasis added).

In other words, the zone-of-danger test subsumes and includes – as part one of a two-alternative standard – the traditional "physical impact" test. And as formulated by the Supreme Court in *Gottshall*:

> "**Under the physical impact test**, a plaintiff seeking damages for emotional injury stemming from a negligent act must have contemporaneously sustained a **physical impact (no matter how slight)** or injury due to the defendant's conduct."

Gottshall, 512 U.S. at 547 (emphasis added).

The Supreme Court, therefore, adopted the traditional "physical impact" test as part one of a two-alternative test, **without modifying, limiting or restricting the traditional doctrine**.

The Sixth Circuit, however, mistakenly interpreted *Gottshall* as having supposedly modified the zone-of-danger test – including the traditional "physical impact" test – so that neither alternative applies unless the emotional injury suffered by a railroad employee was "caused by **fear of physical injury to himself**[.]" *Lukowski*, 416 F.3d at 483-84, quoting *Gottshall*, 512 U.S. at 556 (emphasis added).

What the Sixth Circuit relied on in reaching this remarkable conclusion is the portion of *Gottshall* which – after having restated the traditional "physical impact" and zone-of-danger tests – explained why the pure **zone-of-danger portion** of the zone-of-danger test "is consistent with the FELA's central focus on physical perils." *Gottshall*, 512 U.S. at 555. As *Gottshall* reasoned:

> "[W]hile the statute may have been primarily focused on physical injury, it refers simply to 'injury,' which may encompass both physical and emotional injury. We believe that allowing recovery for negligently inflicted emotional injury as provided for under the zone of danger test best harmonizes these considerations. Under this test, **a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not**. Railroad employees thus will be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting the statute of alleviating the physical dangers of railroading."

Gottshall, 512 U.S. at 556 (emphasis added).

The context of the phrase taken by the Sixth Circuit as limiting the physical-impact test (i.e., "emotional injury caused by **fear of physical injury to himself**") was the Supreme Court's explanation concerning why the pure zone-of-danger portion of the zone-of-danger test "harmonizes" the F.E.L.A.'s "central focus on physical perils," *Gottshall*, 512 U.S. at 555, with the statute's use of the word "injury,"

which "may encompass both physical and emotional injury." *Gottshall*, 512 U.S. at 556. Providing an example of how the second-part of the two-alternative zone-of-danger test (the pure zone-of-danger alternative) would operate, *Gottshall* explained:

> "Under this test, a worker **within the zone of danger** of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, **whereas a worker outside the zone will not**."

Gottshall, 512 U.S. at 556 (emphasis added).

This portion of *Gottshall* was clearly aimed at the second-alternative of the two-part zone-of-danger test (the pure zone-of-danger alternative), and has no application to the first alternative – the traditional "physical impact" test. Consequently, in referring to a worker being able to "recover for emotional injury caused by fear of physical injury to himself," *Gottshall* was referring to the pure zone-of-danger portion of the zone-of-danger test, with its focus on "a worker within the zone of danger," and "a worker outside the zone." *Gottshall*, 512 U.S. at 556.

At most, the portion of *Gottshall* quoted by the Sixth Circuit (as supposedly limiting recovery for "emotional injury caused by fear of physical injury to himself") referred to the second portion of the *Gottshall* test, concerning "a worker within the zone of danger." *Gottshall*, 512 U.S. at 556. The portion of *Gottshall* quoted by the Sixth Circuit did not refer to – and therefore did not modify or limit – the traditional "physical impact" portion of the *Gottshall* test.

In addition to taking a portion of *Gottshall* out of context, the Sixth Circuit ignored the fact that *Gottshall* adopted the most "progressive" rule that was available at common law in 1908 when the F.E.L.A. was enacted. *Gottshall*, 512 U.S. at 555. This progressive rule was the two-alternative zone-of-danger doctrine that incorporated, as part one, the traditional "physical impact" test. As *Gottshall* explained:

> "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a **physical impact** as a result of a defendant's negligent conduct, **or** who are **placed in immediate risk of physical harm** by that conduct."

Gottshall, 512 U.S. at 547-48. And as formulated by the Supreme Court in *Gottshall*:

> "Under the physical impact test, a plaintiff seeking damages for emotional injury stemming from a negligent act must have contemporaneously sustained a **physical impact (no matter how slight)** or injury due to the defendant's conduct."

Gottshall, 512 U.S. at 547 (emphasis added).

Applying the first alternative of the *Gottshall* test, Lukowski and Blauvelt can recover for emotional injury caused – "in whole or in part," *45 U.S.C. § 51* — by the Railroad's negligence, because they sustained "physical impact (no matter how slight)." *Gottshall*, 512 U.S. at 547.

Significantly, the traditional "physical impact" test did not limit recovery to emotional injury "caused by fear of physical injury to himself." Moreover, at the time the F.E.L.A. was enacted in 1908, "the weight of American authority favored

the physical impact test," *Gottshall*, 512 U.S. at 554-55 (internal quotation marks omitted), though "the zone-of-danger test had been adopted by a significant number of jurisdictions." *Gottshall*, 512 U.S. at 555.

Because the zone-of-danger test was "recognized as being a progressive rule of liability that was less restrictive than the physical impact test," *Gottshall* decided "it is reasonable to conclude that Congress intended the scope of the duty to avoid inflicting emotional distress under F.E.L.A. to be coextensive with that established under the zone of danger test." *Gottshall*, 512 U.S. at 555.

This means that *Gottshall* adopted the version of the zone-of-danger test that existed in 1908 – including the traditional physical-impact test – under which an F.E.L.A. plaintiff can recover for emotional injury from a negligent act if he or she "contemporaneously sustained **a physical impact (no matter how slight)** or injury due to the defendant's conduct." *Gottshall*, 512 U.S. at 547.

Gottshall did not rewrite the traditional physical-impact test to include the Sixth Circuit's remarkable new requirement that a plaintiff who sustains a physical impact can only recover for "fear of physical injury to himself." *Lukowski*, 416 F.3d at 483-84, quoting *Gottshall*, 512 U.S. at 556.

The Supreme Court should grant *certiorari* in this case for the following reasons:

1) The Sixth Circuit clearly and unquestionably misinterpreted *Gottshall* as supposedly having modified the traditional "physical impact" test;

2) Further development of this issue in the lower courts would not provide any substantial assistance to the Supreme Court in recognizing and correcting the Sixth Circuit's manifest misinterpretation of *Gottshall*;

3) The Sixth Ciruit's misreading of *Gottshall* threatens injustice in a substantial number of F.E.L.A. cases; and

4) Correcting the Sixth Circuit's manifest misinterpretation of *Gottshall* would not require a substantial amount of the Supreme Court's limited resources. A short *per curiam* opinion would do the job.

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